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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1943

No. 148

N. N. S. MATCOVICH,
Petitioner,

vs.

CLIFFORD C. ANGLIM, as Collector of Internal Revenue for the First District of California,
Respondent.

CLOSING BRIEF OF PETITIONER.

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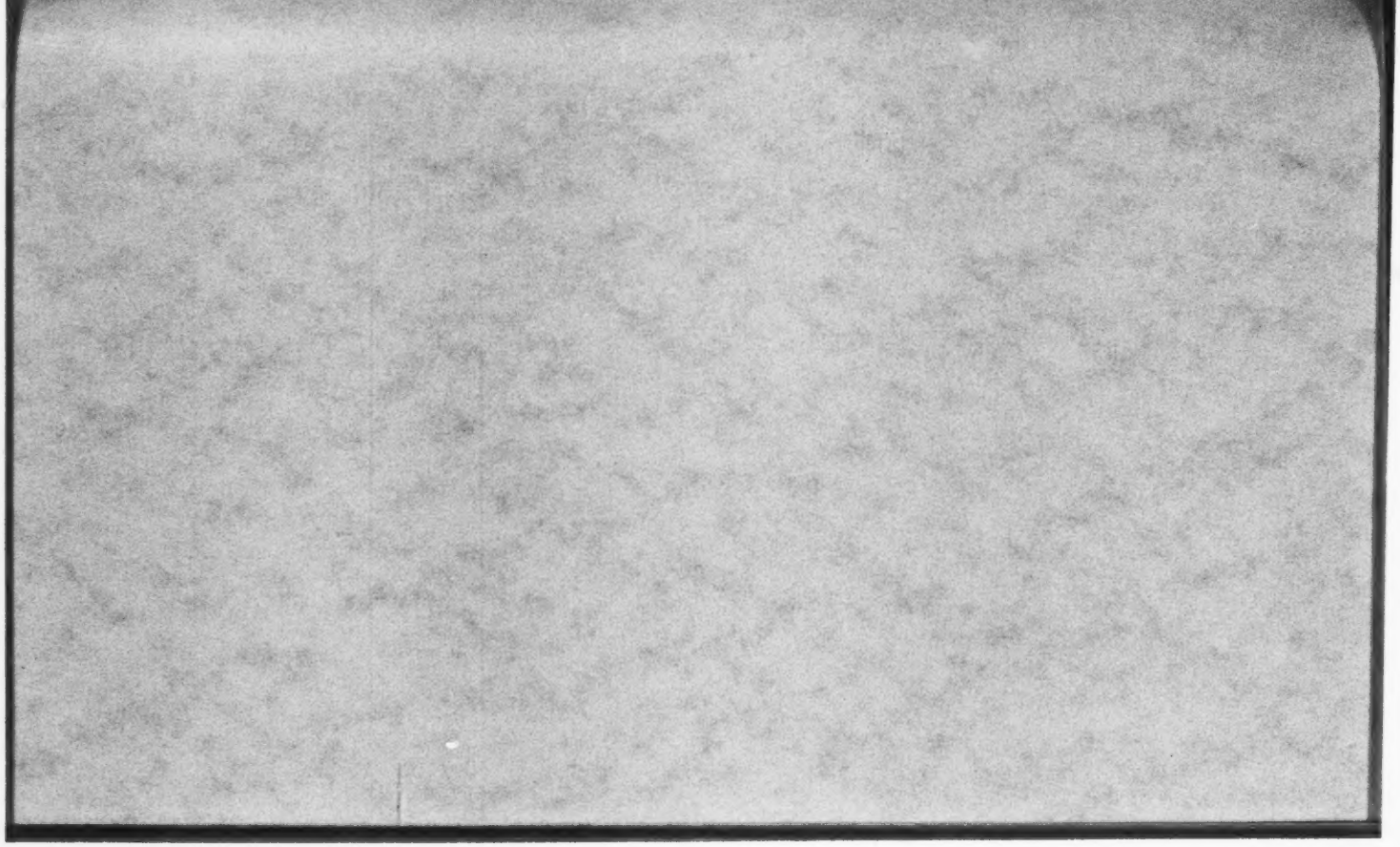

Table of Authorities Cited

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Respondent makes no answer to the points made in our opening brief except to say "the case turns upon its own facts and does not call for further review". (Resp. Brief, p. 7.)

The lower Court found that the written license was actually entered into between the dancer and the petitioner. (R. 25-26.) This clearly establishes a relationship of an independent contractor and is clearly inconsistent with an employer-employee relationship. Not-

withstanding this written agreement, the lower Court concluded from the other findings that the petitioner exercised such control as would justify the conclusion that the relationship of employer-employee existed. It ignored the written agreement without any issue of fraud or subterfuge being presented. The authorities set out on pages 15 and 16 of our opening brief hold to the contrary. Consequently it is not a factual situation but a question of law as to whether a Court can set aside a written agreement which establishes their relationship without some equitable ground for so doing, such as fraud or subterfuge.

In considering this matter the Circuit Court said:

> "If we are to consider the license agreement between the parties as conclusive on the origin and existence of the relationship, then it is clear that the arrangement between the parties was a license." (R. 144.)

It then concludes, however, that the rule laid down in *Griffith v. Commissioner,* 308 U. S. 355-58, permits the setting aside of the written contract. (R. 144.) This is contrary to the holding of the Fifth Circuit in *Commissioner v. Falcon,* 127 Fed. (2d) 277. If the Federal Court had not definitely found that the written agreement was in effect, the situation would have been entirely different. Having so found, it was not within the province of the Court to set it aside without finding that it had been entered into through fraud or for the purpose of subterfuge.

The Circuit Court in considering the evidence on control recognized "that all of these controls could be

exerted through a license agreement". (R. 144.) Such evidence was consistent with the license agreement. What becomes of the written agreement? According to *Commissioner v. Falcon,* supra, under the circumstances in this case, it stands until set aside for fraud or subterfuge.

Dated, Sacramento, California,
August 23, 1943.

Respectfully submitted,
HORACE B. WULFF,
Counsel for Petitioner.

R. H. SCHWAB,
Of Counsel.